IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 533.

GEORGE W. FELTS, APPELLANT,

vs.

E. J. MURPHY, WARDEN OF THE ILLINOIS STATE PENITENTIARY AT JOLIET.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Additional and Reply Brief for George W. Felts, Appellant.

Additional and Reply Brief.

There is no controversy as to the facts as set up in the petition. The answer of Warden Murphy sets up the mittimus, which operates as a general demurrer.

The facts are that Felts was convicted and sentenced for life, without having heard one word of the examination of the jurors, or one word of the evidence given against him. The only part of the proceedings of which hewas advised was, the verdict was written out for him and his sentence was given by the sheriff, through his ear trumpet.

Common law right to be Present, Confront the witnesses, etc.

I respectfully claim that this was a denial of due process of law, and deprived him of his liberty without due process of law as prescribed by the Common law and adopted by the State of Illinois ; and, secondly, that it deprived him of the privileges and immunities granted to others in this: 1st. Every other citizen in his condition was given the common law right to hear the examination of jurors and witnesses against him. 2d. That the only way he could appeal or get a review in the State Supreme Court by writ of error, was to pay $800 necessary to write up the evidence for Bill of Exceptions, which he was and is absolutely unable to do.

Whereas, any other citizen possessed of $800, could get a hearing on his Constitutional right and all other questions.

I do not claim any Constitutional right of appeal on mere error, but do claim that when the Constitution provided for certain rights, it raised the presumption that somehow, somewhere, sometime, the question of a man's Constitutional rights might be raised and determined.

That question of constitutional right never has been raised or determined in any Court of the State of Illinois and Geo. W. Felts never can raise it there, and I respectfully suggest that when a State by its statutes or the Courts of that State by its rules of practice, say to a prisoner, your Constitutional question can only be raised

on an appeal at a cost of $800, which is possible for some and impossible for others, then the laws and practice of that State lack uniformity, and limits the privileges of the poorer classes in violation of the Federal Constitution.

It may not be necessary, in this case to determine this question, for the reason that Pelts was clearly denied the right to a jury trial, but if this point is reached, I can not see how a conviction and sentence can be constitutional, under a practice that allows one class to appeal, and refuses the same thing to another class. Especially where on appeal a constitutional right is raised for the first time.

This case shows that in Illinois the moneyed class may go up on appeal, and the class without money can not, and this in face of the high sounding State Constitution.

> "Every person ought to find a certain remedy in the law for all injuries, for all wrongs he may secure, and of Judicial proceedings *according to the course of the common law.* He ought to obtain by law right and justice freely *and without being obliged to purchase it.*"

In the first brief filed we show that there was a well-established rule at common law for the trial of deaf persons. This common law rule of procedure was contained in the ordinance of 1787, for the government of the Northwestern Territory, Art. 2: "The inhabitants shall always be entitled to the benefit of the writ of *habeas corpus*, and of the trial by jury."

In Illinois Constitution of 1818, recites its admission into the general government "*consistent with the Constitution of the United States*, and the benefits of the *acts of Congress of 1787*."

Every State Constitution has provided for trial by jury as heretofore enjoyed, and the statutes of Illinois provides that trials for criminal offences shall be conducted according to the course of common law, except where statute points out a different mode.

If the Court had pursued the common law rule for proceeding before the jury in this case, it would have determined the extent of the defendant's affliction using a jury if necessary.

2d. If the defendant was able to read, the indictment should be handed to him with usual questions written upon paper.

3d. The prisoner should then plead.

4th. Then answer how he would be tried.

5th. The names of all of the jurors should be handed to him, and their answers communicated to him, and he should be asked whether he objected to them.

6th. The Judge's notes of evidence (or transcript of stenographer) should have been given to him and he should have been asked whether *he* had any questions to ask. The verdict should be written out and handed to him. That is, he should be informed of the details of the trial as it progressed.

There is no doubt the *form* of procedure might be changed, by Statute, provided the *substance* as provided

by the Constitution, is retained, but there can be no claim that the Illinois Legislature, has attempted to change this procedure *even in form*. There are two provisions in our Statute of Illinois, one provides for the Court entering a plea of not guilty where a prisoner stands maliciously—mute; and another provision for trying those who are lunatics. Neither provision applies to this case. [So that the common-law form of Jury Trial as guaranteed by the Federal Court on 14th Amendment, as to due process, provides that the proceedings must be clearly imparted, or communicated to the prisoner—particularly the examination of the jurors, and the testimony of witnesses who testify against him. Having never heard or had communicated to him the examination of the jurors, he could not ask questions and having never heard the evidence of the witnesses against him, he could not suggest cross-examination. He was entitled to be present, to "hear and be heard" and was therefore denied a Constitutional right.

Our next proposition is that, even though the Court had at the beginning of the trial, full and complete jurisdiction of the offense and the person, yet when the Court deprived the prisoner of any constitutional right it lost jurisdiction, and the judgment was void.

> "If the Court errs in * * interpreting a constitutional immunity or right secured thereby, against the prisoner, or in refusing him a constitutional right, the jurisdiction over him ceases, and his acts over him are not simply erroneous, but void."

In re Neilson, 131 U. S., p. 183, and other cases.

The warden, by his counsel contends that we seek by this writ, to have it take the place of a writ of error or appeal. We have shown why we can not take a writ of error or appeal, and insist respectfully that *having been deprived of a constitutional right, we are not limited to a writ of error, or appeal from a void judgment.* In the 20 cases cited by the Warden's or State's counsel there is not a single case where this court has refused to grant the writ of *habeas corpus*, after finding that the prisoner had been, on his trial, denied any constitutional right.

In re Lennon, 166 U. S., 552. Contempt proceedings. Petition alleged violation of constitutional rights, but this court expressly found there had been no violation of constitutional right.

In re Eckhardt, 166 U. S., 481. No constitutional right impaired. No constitutional form of indictment, and U. S. *v.* Pridgeon, 153 U. S., 48. Indian Territorial indictment.

Ried *v.* Jones, 187 U. S., 153, question of practice decided that the petition should ordinarily go to the Supreme Court of the State. Decided Ried *v.* Colorado, *ante*, 137, that no constitutional right had been violated.

Ex parte Bigelow, 113 U. S., 328.

Prisoner raised question twice in jeopordy, in trial court, was defeated. He appealed and the judgment was affirmed. Act of Congress made that judgment conclusive. This court refused *original* jurisdiction and did not decide that prisoner had been deprived of his constitutional rights.

Ex parte Belt, 159 U. S., 95. Defendant was convicted of second offence. Defendant alleged that jury was waived on first trial, and that that made second trial unconstitutional. Held that contention not sound.

Storti *v.* Massachusetts, 183 U. S., 138.

Question as to Treaty rights. Defendant, a citizen of Italy, claimed equal rights and this Court held there was nothing in the Record showing lack of equality.

Ex parte Tyler, 149 U. S., 164.

128 U. S., 289.

Petition for Writ of Habeas Corpus.

In Contempt case. No violation of Constitutional right shown.

7 Wheaton, 38, 43. A Contempt case.

Justice Story said:

"The only objection is, *not* that the Court acted beyond its jurisdiction, but that it erred in its judgment as to the law."

127 U. S., *In re* Coy.

Held the Court that sentenced defendant *had* jurisdiction, no Constitutional rights involved.

In re Schnieder.

Writ denied because application relates to an error and does not go to jurisdiction or authority.

In re Debs, 158 U. S., 365.

The Circuit Court punished for contempt.

No Constitutional question, the Court held.

3 Peters, 193.

Ex parte Watkins.

Defendant convicted.

There is no allegation in the Petition even, that the Constitutional rights had been impaired. Simply an effort to get this Court to review an *alleged error*.

110 U. S., 651.

Ex parte Tambrough.

Tambrough and others, indicted for conspiracy to intimidate voters and convicted—confined, asked for writ of *habeas corpus*. Held, this Court has no *general* authority to review an error, &c., but when a prisoner is held on a matter without the jurisdiction of that Court, then this Court should discharge the prisoner.

18 Howard, 307.

18 Wall, 163.

93 U. S., 18.

150 U. S., 637.

Swan, in contempt for carrying away liquor, in the hands of a receiver. No Constitutional rights impaired.

In re Ayers,

Scott.

McCabe.

Contempt Cases.

While the order was not subject to review by writ of error or appeal, yet when a Court "attempts to punish a man for refusing to comply with an order which that Court had no authority to make, the original order was *void*, the order punishing for contempt is *void* and if the proceedings result in *imprisonment*, this Court will discharge on writ of *habeas corpus*.

113 U. S., 713.

Ex parte Fisk.

The last case cited by the State, really sustains my contention.

Fisk was sued by Fogg to recover on *account* of false representations by Fisk in the sale of mining stock. The case removed to Circuit Court of United States and he was ordered to testify before a Master, but declined to answer on advice of counsel on the ground that the Court had no jurisdiction. He was fined and committed to custody of Marshall, but this Court discharged him on the ground that the Circuit Court was without authority to make the order for the examination of petitioner in the case and therefore without authority to enforce by contempt. **Prisoner released.**

Ex parte, Harding, 120 U. S., 782.

This Court refused to take original jurisdiction on a petition for writ of *habeas corpus*, even though it alleged that the Constitutional right of compulsory process was denied to the prisoner. The refusal was under the fol. lowing circumstances:

Montana, created by Act of Congress May, 1864. Territorial Courts were established, among them the Supreme Court of that Territory. Appeals from the Supreme Court were limited by Section 702 of the Revised Statutes of the United States, to cases where the United States Constitution, Treaty, or Statutes, were involved.

OPINION IN FULL.

Submitted March 16; Decided March 21st.

This Court has no jurisdiction for a discharge on *habeas corpus* of a person imprisoned under the sentence of a Territorial Court in a criminal case, unless the sentence exceeds the jurisdiction of that Court, and there is no authority to hold him under the sentence. Ex parte Wilson 114 U. S., 417.

The fact that a law of a Territory allowed an alien who had declared his intention to become a citizen of the United States to sit on the jury that found the indictment against the petitioner, did not deprive the Court of its Jurisdiction, for his trial under the indictment. This objection, if it be one, goes only to the regularity of the proceedings, not to the jurisdiction of the Court. The same is true of the allegation in the petition, that the petitioner was denied the right to have compulsory process for obtaining witnesses in his favor. For such errors and irregularities, if they exist, a judgment is not void, and the writ of *habeas corpus* gives this Court no authority for their correction. *Motion denied*.

This upon hasty reading seems strongly against my contentions as to the law, but it does not apply to the case at bar for several reasons:

First, when the Court stated that the refusal of "compulsory process" as guaranteed by the Article 4, of the Amendment to the Constitution, "did not deprive the Court of its jurisdiction" it could only mean that the right to refuse compulsory process was reserved to the

State or Territory, or else that "compulsory process" in Article 4 was not a part of "due process" in Montana, or it is in direct conflict with the scores of cases decided by this Court, to the effect that when a trial Court deprives a prisoner of any of his Constitutional rights, then and there the Court loses jurisdiction, and the judgment based on an unconstitutional trial, is void, and where the judgment is void, the prisoner is *not limited to an appeal*, but may ask and obtain relief under a writ of *habeas corpus*.

The opinion and intention of Chief Justice Waite is clear from the very case cited, in this opinion. The case cited was *Ex parte* Wilson, 114 U. S., 417, and sustains in its language its reasoning and its result the very proposition for which I contend. There were five particular reasons set up in the petition for *habeas corpus* only two of which went to the impairment of the Constitutional rights, and the Court held that, as to the whole five claims or reasons assigned for the writ, only one showed adeprivation of a constitutional right; *i. e.*, trial for infamous crime without indictment, and for that single impairment of constitutional right, this court held the Court "*had no jurisdiction*" and that the judgment was void, and discharged the prisoner.

It may be said that in the case last cited, the Court never had jurisdiction, and therefore the whole proceedings were void, while in the case at bar, the Court had jurisdiction. We admit the Court may have had jurisdiction at the beginning of the trial, but we feel certain that when the Court deprived him of the right to hear

the examination of jurors and evidence of witnesse against him, the Court abandoned the "due process of law," and lost jurisdiction, and its judgment, is therefore, void.

His Honor, Judge Honore, the only State Judge who ever permitted the filing of a written brief, in support of this petition, followed this Court's practice, up to the point of practically finding the judgment void, but felt embarrassed about setting aside the judgment and leaving the indictment pending. (See opinion, page 34, Record).

That Court (Judge Honore) concedes that the trial is a nullity, and the judgment and sentence is void, because the prisoner was " deprived of one of his substantial rights guaranteed to him by the Constitution," and then proceeds to leave him to life imprisonment, under a void and unconstitutional judgment, because he fears the prisoner may never be tried under the pending indictment.

The Court (Judge Honore) then cites the two cases, cited herein by the State's Attorney. Swan, 150 U S., 637, and Pridgeon, 153 U. S., 48, when an examination, as herein before stated, shows that in neither case had the prisoner been deprived of a constitutional right.

But even if the rule should be changed so that a prisoner, deprived of his Constitutional rights, must ordinarily be limited to appeal or writ of error, yet that rule would not apply here, without an absolute denial of even a hearing on his Constitutional rights, for the

record shows, that the prisoner is unable to comply with the rules of the Court of Illinois, and pay seven or eight hundred dollars for a bill of exceptions, which is necessary to get a hearing in the Supreme Court of Illinois.

If this Court thinks we should or could go on some short record in the Supreme Court of Illinois, we answer we have been there; and this is practically appeal from that Court as well as from the United States Circuit Court (see Record).

His Honor, Judge Landes, makes what seems to me the same error. His Honor refused to grant the writ in this case, quoting principally the case of Bergeman *vs.* New Jersey, 157 U. S., 655, opinion by Justice Harlan. In that case, the Legislature prescribed the *form* of indictment, and this Court held that the Statute which fixed the form of the indictment was not repugnant to the Constitution, because indictment proceedings only guaranteed the trial in United States Courts and the State had power to legislate.

Suppose in the case at bar the Illinois Legislature had passed an Act for the trial of prisoners who were deaf, which, in affirmative terms, prohibited the prisoner from hearing the examination of jurors and the witnesses who testified against him and providing that the only thing necessary for the prisoner to hear would be the verdict and sentence. Clearly such act would violate the fourteenth Amendment as to "due process" and also because denying "equal protection."

On the contrary, the Constitution and laws of Illinois provide for the adoption of the common law, which prescribe affirmatively, that a deaf person should have communicated to him, the examination of jurors, etc., and no statute in Illinois has been passed abridging the common law right of a deaf prisoner to have the examination of jurors and witnesses translated to him, and the practice of that State is to follow that common law right. A deaf and dumb man tried and convicted and sentenced, before Judge McEwing, within the year, had upon the suggestion of the Court, not only the indictment translated to him, but through an interpreter had the examination of jurors and all witnesses interpreted to him.

So that the treatment of Felts, in not giving him that trial, not only violated the laws of Illinois, and the practice of its courts, but is totally repugnant to the fourteenth Amendment to the Constitution, which provides for "due process" and "equal protection."

In the Bergeman case, cited by Judge Landis, the question of indictment was wholly within the power of the State. It is one of those powers which by construction of this Court is left to the States, whereas, the amendment under which we claim relief, is a limitation addressed and applicable *to the States*.

The same as to Maxwell *vs.* Dow, 176 U. S., 581, cited by his honor, Judge Landis. In that case the act of the State Court complained of, that the defendant was tried by eight jurors, and he was proceeded against by information, and not by indictment, in both of which matters

this Court held that the State of Utah had power to provide, as it did, by its Constitution, for the prosecution by information instead of indictment, and that the jury (except in capital cases) "shall consist of eight jurors."

Also that, as the Articles of the Federal Constitution did not prohibit the States from so doing, the Constitution of Utah was not in violation of the 14th Amendment.

In the case at bar, there is no claim that the Illinois Constitution or Legislature has ever attempted to deprive a deaf person, tried for crime, from the Common Law right to hear the examination of jurors and witnesses. The contrary is true. That State provides in its Constitution for such Common Law right, and the Courts of that State, always give a deaf prisoner that right, the only exception that I have ever heard of is the case at bar, and pardon repetition, in this case, the prisoner was deprived of one of the "natural rights of man" he was deprived of one of the rights granted to others by the laws and practice of Illinois, and therefore deprived of "due process" and "equal protection of the laws."

In Hurtado *vs.* California, 110 U. S. 517, cited by Judge Landis, is to the same effect as the case last cited. The constitution of California provided for "Information" in place of "Indictment," and this Court held, as above, that the provisions in the Federal Constitution providing for indictment did not prohibit the States from dispensing with indictment. Suppose California had not provided for proceedings by information, and had provided for "indictment" in its constitution

and laws, and followed that practice in its courts in all cases, except the case cited? Would there be any doubt in the mind of this Court, that such proceedings were without "due process," and also a deprivation of "equal protection of the laws." In the case last cited, the Court quotes from Justice Curtis' opinion, Murry *vs.* Hoboken, 18 Howard, 272, as to how to ascertain what "due process of law" is:

> "The answer must be two-fold. We must examine the Constitution itself to see if this process with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common law of England," &c.

In the case Markuson *vs.* Boucher cited, 175 U. S., p. 184, the petitioner *alleged* a deprivation of Constitutional rights, but alleged no fact in the petition which showed a violation of Constitutional rights. The petition complained in several particulars: But allege and show that the prisoner's conviction was under the *Revised Statues of the State*, and related to matters in which the State had the right to establish procedure under the former decisions of this Court.

In other words, the Court proceed under a statue which permitted information, instead of indictment, and that if the Statute "operated" to deprive persons of "due process" in providing for conviction in contempt cases without a jury.

The allegation of the petition shows that his conviction *was by due process*, as established by the State; whereas, in the case at bar, we allege and show that *due*

process in Illinois is the *common law process*. That it is made so by the Constitution and Statutes of Illinois, and when the Constitution provides that all criminal cases should be tried by the rule of common law proceedings, except when limited by statute, and there being no statutory rule for the trial of a person who is deaf, it is the same as saying all deaf persons shall be tried when charged with a crime by the rules and proceedings of the common law.

The suggestion of referring this prisoner again to the Supreme Court of Illinois is most shocking to a true sense of justice, not only because the prisoner can not go up on a writ of error on account of its expense, but *also* because that Court has already held that the facts set up in this petition "do not furnish sufficient reason for reversal." They not only denied the writ, but answered that to deprive a man from hearing the examination of jurors and witnesses against him was not even error sufficient to grant a new trial, and if the Court should imagine that we might, under the Common Law practice, raise this, our point, in that way, we respectfully answer that we did do so in our application, and it would be a denial of justice to send us back to a Court on our point, that point having been already decided.

There is no appeal allowed in this case from the Winnebago Circuit Court. If it goes to the Supreme Court of Illinois, it must go on a writ of error. French *vs.* Illinois, 77 Ill., 531.

To secure a writ of error, defendant must have a Bill of Exceptions, signed by the Court, tendered to the Court "during the progress of the trial." In the case at bar, I am informed that he was given ninety days to prepare that Bill of Exceptions, which has long since passed.

The prisoner being without means, no Bill of Exceptions could be made.

The following is the Illinois Statute governing the case: Sec. 197, Revised Statutes of 1845.

> "In the trial of any person for any crime or misdemeanor, it shall be the duty of the Judge before whom such trial is pending, to sign and seal any Bill of Exceptions tendered to the Court, during the progress thereof; Provided the truth of the case be fairly stated in such Bill of Exceptions."

It is a physical impossibility to make this bill of exceptions, without a transcript of the evidence, which will cost above seven hundred dollars. And as I now read the statute, the time for the bill of exceptions, having passed (through the misfortune of the prisoner) I do not see how a bill of exceptions can be presented to the Supreme Court of Illinois, which will be necessary as a basis for the writ of error, even though he was able to get some charitably disposed person to give him the money to purchase the stenographer's transcript.

WILLIAM E. MASON,
For Geo. E. Felts, Relator.